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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 41

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, A. F. L., et al.,

Petitioners,

v.

FAIRLAWN MEATS, INC.,

Respondent.

No. 280

P. S. GUSS d/b/a PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,

Appellant,

v.

UTAH LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE STATES OF FLORIDA, GEORGIA, TEXAS, VERMONT, VIRGINIA, WYOMING AND THE WISCONSIN EMPLOYMENT RELATIONS BOARD

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AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, A. F. L., et al.,

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BRIEF AMICUS CURIAE ON BEHALF OF THE STATES OF FLORIDA, GEORGIA, TEXAS, VERMONT, VIRGINIA, WYOMING AND THE WISCONSIN EMPLOYMENT RELATIONS BOARD

QUESTION INVOLVED

The question to which this brief is addressed, and which the above friends of the court deem to be presented by the combined cases of *Amalgamated Meat Cutters, etc. v. Fairlawn Meats, Inc.*, No. 41, and *P. S. Guss, etc. v. Utah Labor Relations Board, et al.*, No. 280, is:

> **Did Congress intend by the passage of the Labor Management Relations Act, 1947, to deny to states the authority to deal with labor relations of those intrastate enterprises which, although affecting interstate commerce to some extent, do not meet the jurisdictional standards of the National Labor Relations Board, regardless of whether the National Labor Relations Board has specifically declined to act in a particular controversy?**

POSITION OF THE SEVEN STATES FILING THIS BRIEF AS AMICI CURIAE

This brief is submitted by the chief law enforcement officers of the above states, whose duty and responsibility it is to preserve internal peace and to administer justice to their citizens. Such officers are of the opinion that a negative answer to the foregoing question is essential if they are to be enabled to perform their functions justly and adequately.

The participating states have by no means uniform regulation in the field of labor relations; and so this brief is not addressed to the defense of any particular type of legislation. It is deemed that the preservation of industrial peace within state boundaries is a matter "primarily of interest to the state";[1] and so it is respectfully submitted that a rule be adopted recognizing the reserved powers of states to deal with a subject so vital to their citizens, by whatever means they find best meet peculiar local conditions—whether by general legislation, judicial control under principles of common law, administrative regulation, criminal prosecution, or otherwise—always providing that constitutional rights of each individual are respected.

The area of state authority which this brief seeks to support is, however, limited to enforcement of state law, and takes no position with respect to any attempt by a state to enforce federal policies as such.

This brief is filed on behalf of the States of Florida, Georgia, Texas, Vermont, Virginia, Wyoming and the Wisconsin Employment Relations Board, as friends of the court.

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[1]Bethlehem Steel Co. v. New York State Labor Rel Bd., (1947) 330 U. S. 767, 772, 67 S. Ct. 1026, 91 L. ed. 1234.

FACTUAL SITUATIONS TO WHICH THIS BRIEF IS ADDRESSED (THAT SEGMENT OF INTRASTATE INDUSTRIES, WHOSE OPERATIONS ARE WHOLLY WITHIN THE BOUNDARIES OF A SINGLE STATE, AND WHICH ARE COMPARATIVELY SMALL SO AS TO BE WITHIN THE AREA, WHICH THE NATIONAL LABOR RELATIONS BOARD HAS FOUND TO HAVE "INTRINSICALLY LOCAL CHARACTERISTICS AS AGAINST THOSE HAVING A SUBSTANTIAL IMPACT UPON COMMERCE"[1])

Some of the participating states might wish to extend arguments as to state jurisdiction to situations and areas not presented by the cases before the court; and are not precluded from doing so by limitations recognized in this brief. The arguments here presented, however, are related solely to factual situations similar to the cases in which the brief is entitled.

1. Both enterprises operate solely in intrastate commerce, wholly within the boundaries of a single state.

The historical dividing line between interstate and intrastate enterprise is disregarded by many writers discussing jurisdiction under the Labor Management Relations Act, 1947, because the law may by applied to both. When the issue is the extent to which Congress intended to preclude state action, however, the fact that an industry lies within the traditional field of reserved powers of states, may have some bearing.

The Labor Management Relations Act, 1947, did not eliminate the line between interstate and intrastate com-

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[1]Breeding Transfer Co., 110 N. L. R. B. 493, 496.

merce, as judicially defined, although it extended the scope of federal regulation into the intrastate area.[1] This court has recognized that far greater enterprises than the ones here involved—enterprises with multi-state plants, affiliates, and subsidiaries—were intrastate enterprises, subject to federal law only because of their *effect* upon commerce.[2]

The labor relations of the small firms involved in these cases are, to a far greater degree than the manufacturing concerns of which this court spoke in the following words, "primarily of interest to the state" because:

> "* * * they draw their labor supply from its residents, and the impact of industrial strife in their plants is immediately felt by state police, welfare and other departments. Their labor relations are primarily of interest to the state, are within its competence legally and practically to regulate, and until recently were left entirely to state control. Thus, the subject matter is not so 'intimately blended and intertwined with responsibilities of the national government' that its nature alone raises an inference of exclusion. *Cf. Hines v. Davidowitz*, 312 U. S. 52, 66."[3]

2. The volume of operations of both enterprises is comparatively small, so that they unquestionably fall in the area classified by the National Labor Relations Board, on the basis of its years of experience, as "having intrinsically local characteristics"[4] so that the National Board would decline to assert jurisdiction over them.

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[1] See sec. 2, subsets. (6) and (7) of the Labor Management Relations Act. 29 U. S. C. sec. 152 (6) and (7).

[2] National Labor Relations Bd. v. Jones & Laughlin S. Corp., (1937) 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615; Bethlehem Steel Co. v. New York State Labor Rel. Bd., (1947) 330 U. S.767, 67 S. Ct. 1026, 91 L. ed. 1234.

[3] Bethlehem Steel Co. v. New York State Labor Rel. Bd., (1947) 330 U. S. 767, 772, 67 S. Ct. 1026, 91 L. ed. 1234.

[4] Breeding Transfer Co., 110 N. L. R. B. 493, 496.

The limits of the operations of the enterprises are established by the records in both cases, and conceded by the parties to be outside the jurisdictional standards of the National Labor Relations Board. For purposes of this brief, it is conceded that such enterprises as were involved in the *Bethlehem Steel* and *Jones-Laughlin* cases, supra, are still beyond the purview of state regulation.

SUMMARY OF ARGUMENT

The firms involved in these cases are comparatively small ones, whose operations are solely in intrastate commerce, and of the class determined by the National Board to have "intrinsically local characteristics."

There is nothing in the words of the Taft-Hartley Act to manifest a Congressional purpose to exclude states from regulating in such cases; and the records of Congressional debates show a contrary intent.

Congress' failure to change the law shows its approval of the pronouncements by this court that state regulation is permissible where there is no conflict with federal law or administration.

Congress has acquiesced in this court's pronouncement that "state protective action" is appropriate with respect to industries of which the National Board could, but does not, take jurisdiction; and that such state action is one of the grounds upon which the National Board may determine that the National Act should not be applied.

Throughout the history of federal labor legislation, the administrative interpretation has been that states have au-

thority to regulate industries outside the jurisdictional standards of the National Board. Congress has manifested its approval of the administrative interpretation.

The National Board's pronouncement of jurisdictional standards has defined a "distinct segment" on which the federal agency does not act. Under the rules pronounced by this court, states may act in such area.

Congress did not intend the law to be interpreted so as to prevent states from giving "equal protection of the law," which would be the result if they could give relief to persons working in industries not affecting commerce, but must deny it to other citizens who have no remedy elsewhere.

There can be neither actual nor potential conflict from permitting states to regulate in an area to which federal law is not applied. Any over-stepping by a state can be readily tested as has been done in the many cases of the past.

The list of industries which would be excluded from *any* regulation, if it were held states could not deal with industries outside the jurisdictional standards of the National Labor Relations Board which affect interstate commerce to an insubstantial extent, include some so important to local welfare that Congress could not have intended to remove them from local control.

Congress must be deemed to have acquiesced in this court's ruling that cession of jurisdiction by the National Board is not necessary to enable states to act, except where conflict in administration might otherwise result. There is no possibility of such conflict in these cases.

The National Board's purpose, to relieve itself of attention to certain areas of industry in order to concentrate on more important cases, could not be realized if it must implement its declination of jurisdiction on a case-by-case basis. The "case-by-case" test has long since been rejected as a boundary line between federal and state authority, with apparent Congressional approval.

The National Board's jurisdictional standards have been so defined as to be easily ascertainable by mathematical calculation, without exercise of discretion.

There has never heretofore been a presumption that a local industry is engaged in, or has an effect upon, interstate commerce, without affirmative proof. Until affirmative proof is offered to show that an intrastate firm is subject to federal regulation, it should be presumed, as in all other cases, that the firm is subject to local control.

The need for prompt action to avert industrial friction is a consideration Congress had in mind. It did not intend that appropriate action should be delayed by unnecessary preliminary formalities.

ARGUMENT

I.

STATE JURISDICTION TO REGULATE LABOR RELATIONS IN INTRASTATE ENTERPRISES, WHOSE OPERATIONS ARE PRIMARILY LOCAL, IS NOT OUSTED UNLESS CONGRESS MANIFESTS AN UNAMBIGUOUS PURPOSE TO THAT EFFECT

For purposes of this argument, it may be conceded that Congress could, *if it chose,* exclude states from acting, because of "close and substantial relation to interstate traffic."[1] This court has stated, however, that federal legislation does not oust state law in such cases unless Congress has "manifested an unambiguous purpose that it should be supplanted."[2]

The question here presented is one of ascertaining the purpose of Congress, and so resort will no doubt be had—as in previous cases—to the usual methods of ascertaining legislative intent.

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[1]**Bethlehem Steel Co. v. New York State Labor Rel. Bd.,** (1947) 330 U. S. 767, 772, 67 S. Ct. 1026, 91 L. ed. 1234.

[2]**Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board,** (1949) 336 U. S. 301, 312, 69 S. Ct. 584, 93 L. ed. 691.

II.

THERE IS NOTHING IN THE WORDS OF THE TAFT-HARTLEY ACT, OR IN ITS LEGISLATIVE HISTORY, TO MANIFEST AN UNAMBIGUOUS PURPOSE TO PRECLUDE STATES FROM REGULATING THEIR INTERNAL LABOR RELATIONS

There is nothing in the express terms of the Taft-Hartley Act to exclude state action. Indeed, the court has recognized that preclusion of state action does not result from terms of the law, but rests upon inferences from "conflicting indications of congressional will."[1] Neither was there any word in the debates prior to adoption of the act to indicate a purpose on the part of Congress to displace state action. Expressions of opinion on the subject were to the contrary.

For example, see 1 Legislative History of the Labor Management Relations Act, 1947, p. 883, where the following questions and answers appear:

> "MR. KERSTEN of Wisconsin. * * * I would like to ask the gentleman about that portion which pertains to the validity of State laws. Wisconsin and other States have their own labor relations laws. We are very anxious that disputes be settled at the State level insofar as it is possible. Can the gentleman give us assurance on that proposition, so that it is a matter of record, that that is the sense of the language and of the report?
>
> "MR. HARTLEY. That is the sense of the language of the bill and of the report. That is my interpretation

[1]Garner v. Teamsters Union, (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228.

of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In other words, this will not interfere with the validity of the laws within that State.

"MR. KERSTEN of Wisconsin. And it will permit as many of these disputes to be settled at the State level as possible?

"MR. HARTLEY. Exactly."

Senator Wiley, who supported the legislation, called the attention of the Senate to regulation by state labor boards shortly before the respective senate and house bills were referred to the conference committee:

"I have urged my colleagues on the Labor Committee, who will take this bill to conference, to insure the concurrent jurisdictions of State labor boards and the National Labor Board, so that insofar as possible each of the State boards may handle problems at the State level, rather than attempt to send all of the problems to Washington to be decided far from the scene of the dispute."

2 Legislative History of the Labor Management Relations Act, 1047, p. 1471.

Even more persuasive than such general expressions is the circumstance that during the arguments no objection was raised on the ground that the law *displaced* or *superseded* any state regulation, although there were numerous references to *duplicating* state law. What is *duplicated* is not *superseded*. Surely, if there had been a prevalent intent to oust state jurisdiction in matters of local concern, at least without insuring a commensurable assump-

tion of responsibility by federal agencies, there would have been *some* voices raised in protest on such ground.

III.

FAILURE OF CONGRESS TO CHANGE PROVISIONS OF THE TAFT-HARTLEY ACT SHOW ITS APPROVAL OF THE JUDICIAL PRONOUNCEMENT THAT THE LAW DOES NOT SUPERSEDE STATE LEGISLATION, WHERE NO CONFLICT EXISTS

The records show that Congress has been well aware of the words of this court in the many cases involving the question of legislative intent as to federal-state jurisdiction under the Taft-Hartley Act. It is an accepted basis of statutory interpretation that failure to change the provisions of a law on which a judicial interpretation is based manifests legislative approval of that interpretation.[1]

Whatever arguments may have been made for or against the rules embodied in earlier decisions on the question of state-federal jurisdiction, Congressional inaction since 1947 has made them a part of the substantive law.

The last major change in the federal law was effected by enactment of the Labor Management Relations Act,

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[1] **Joseph v. Carter & Weekes Stevedoring Co.,** (1947) 330 U. S. 422, 428, 67 S. Ct. 815, 91 L. ed. 993:

> "• • • As the power lies in Congress under the Clause [Commerce] to make any desired adjustment in the taxation area, its acquiescence in our former rulings on state taxation indicates its agreement with the adjustments of the competing interests of commerce and necessary state revenues. • • •"

1947;[1] and so this court's pronouncements since that time, together with Congressional inaction, have become a part of the law as if written into it.

There have been at least 11 cases[2] in which this court has dealt directly or indirectly with the matter of state authority as to labor relations, since enactment of the Taft-Hartley Act. Even in those cases in which the state regulation was held to have been ousted by Congressional occupation of the field, it was uniformly recognized that Congress had not occupied the entire field, but that the Taft-Hartley law "leaves much to the states."[3] In all cases in which this court has held that Congress intended to oust state jurisdiction, the Congressional intent has been inferred on the basis of conflict with, or frustration of, basic Congressional purposes and objectives. The basic rule laid down by the cases, upon which Congress can be presumed to have relied, is well expressed by this court in the following words:[4]

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[1] 29 U. S. C., secs. 151-159.

[2] **United Auto. A. & A. I. W. v. Wisconsin Emp. Rel. Bd.**, (1956) 351 U. S. 266, 76 S. Ct. 794;
Weber v. Anheuser-Busch, Inc., (1955) 348 U. S. 468, 75 S. Ct. 480, 99 L. ed. 546;
United Workers v. Laburnum Corp., (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025;
Capital Service v. National Labor Relations Board, (1954) 347 U. S. 501, 74 S. Ct. 699, 98 L. ed. 887;
Garner v. Teamsters Union, (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228;
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Amalgamated Ass'n., etc. v. Wisconsin Employ. Rel. Bd., (1951) 340 U. S. 383, 71 S. Ct. 359, 95 L. ed. 364;
Wisconsin E. R. Board v. Plankinton Packing Co., (1950) 338 U. S. 953, 70 S. Ct. 491, 94 L. ed. 588;
Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691;
International Union v. Wisconsin E. R. Board, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651;
La Crosse Telephone Corp. v. Wisconsin Employ. Rel. Bd., (1949) 336 U. S. 18, 69 S. Ct. 379, 93 L. ed. 463.

[3] **Garner v. Teamsters Union**, (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228.

[4] **United Workers v. Laburnum Corp.**, (1954) 347 U. S. 656, 665, 74 S. Ct. 833, 98 L. ed. 1025.

"* * * The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. * * *"

Similarly, Congress may be deemed to have acquiesced in the rule laid down by this court that, in any case where "conduct is governable by the State or it is entirely ungoverned,"[1] the states may continue to act under their reserved powers.

IV.

CONGRESS HAS ACQUIESCED IN THIS COURT'S PRONOUNCEMENT THAT APPLICATION OF THE FEDERAL ACT TO INTRASTATE ENTERPRISES IS DEPENDENT ON A FINDING BY THE NATIONAL LABOR RELATIONS BOARD THAT SUCH ENTERPISES AFFECT COMMERCE IN SUCH A "CLOSE AND INTIMATE FASHION AS TO BE SUBJECT TO FEDERAL CONTROL"; AND IN THIS COURT'S RECOGNITION THAT THE AREA TO WHICH THE BOARD DOES NOT APPLY THE ACT IS A PROPER FIELD FOR "PROTECTIVE ACTION * * * UNDER STATE AUTHORITY"

The Labor Management Relations Act was not intended to be self-executing. It can be applied only through the office of the National Labor Relations Board.[2]

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[1] **International Union v. Wisconsin E. R. Board,** (1949) 336 U. S. 245, 254, 69 S. Ct. 516, 93 L. ed. 651.

[2] **Consolidated Edison Co. v. National Labor Relations Bd.,** (1938) 305 U. S. 197, 223, 83 L. ed. 126, 59 S. Ct. 206;

[3] **Amalgamated Utility Workers v. Consolidated Edison Co.,** (1940) 309 U. S. 261, 84 L. ed. 738, 60 S. Ct. 561.

As this court has ruled:[1]

> "* * * The National Labor Relations Act does not extend to all industries and all employees. It is only applicable to those employments in which strikes and labor disputes would affect interstate commerce and *are found to be such by the National Labor Relations Board.* * * *" (Emphasis supplied)

Determination of the "factual question" whether "the conduct of intrastate enterprises does affect * * * commerce in such a close and intimate fashion as to be subject to federal control"[2] is a function left to the National Labor Relations Board, and a function which gives it considerable leeway for exercise of administrative discretion.

Where the application of a law is made dependent upon the discretion of an administrative agency, there are many cases in which the agency might reach divergent results, either of which would be upheld by a reviewing court. Although the discretion may be exercised on a generalized, rather than a case-by-case basis, the situation is analogous to determinations by a jury or other fact-finding agency.

Congress' intent that intrastate industries, which the National Labor Relations Board has found not to "affect commerce in such a close and intimate fashion as to be subject to federal control," should remain subject to state authority is clear from its acquiescence in the *Consolidated Edison* case. The court there recognized that one of the very circumstances which the national board should con-

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[1] **Alabama Federation of Labor v. McAdory,** (1945) 325 U. S. 450, 464, 65 S. Ct. 1384, 89 L. ed. 1725;

[2] **Consolidated Edison Co. v. National Labor Relations Bd.,** (1938) 305 U. S. 197, 222-223, 83 L. ed. 126, 59 S. Ct. 206.

sider was "the bearing and effect of any protective action to the same end already taken under state authority."[1]

The case was decided prior to enactment of the Taft-Hartley Act; but Congress has made no change in the provisions upon which the pronouncement was based, thus manifesting its approval of this court's recognition of residual state authority over enterprises of which the National Labor Relations Board elects not to take jurisdiction.

V.

THE ADMINISTRATIVE INTERPRETATION OF FEDERAL LEGISLATION HAS BEEN TO THE EFFECT THAT INTRASTATE ENTERPRISES OUTSIDE THE JURISDICTIONAL STANDARDS OF THE NATIONAL LABOR RELATIONS BOARD ARE SUBJECT TO STATE AND LOCAL CONTROL

This court has stated that interpretation and application of the federal law by the National Labor Relations Board is entitled to "weight in doubtful situations."[2]

The following statement of former General Counsel George F. Bott is a summation of the position of the board based on years of experience:

> "In practice the Board never has, and I think I may confidently predict it never will, interfere to block state action in a situation where the Board chooses to stay its hand because it believes the impact of the activity on commerce to be insubstantial. . . . To me it seems

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[1] Consolidated Edison Co. v. National Labor Relations Bd., (1938) 305 U. S. 197, 223, 83 L. ed. 126, 59 S. Ct. 206.

[2] National Labor Rel. Bd. v. Denver Bldg. & Const. Tr. Co., (1951) 341 U. S. 675, 692, 71 S. Ct. 943, 95 L. ed. 1284.

clear that as a matter of policy there is no reason why a state should not be free to act in this situation.'"[1]

In the board's decisions curtailing its jurisdiction in 1954, both the majority and minority assumed that the board's declination of jurisdiction was a relinquishment of the abandoned area to local control. The only difference of opinion was whether that was desirable. For example, in *Breeding Transfer Co.*, the minority opinion stated in part:[2]

> "In summary, it is my firm conviction that the new standards are in basic conflict with the Act and the legal responsibilities which it imposes on this Agency. They are premised upon the view that there should be a reallocation of authority between the Federal Government and the States in the regulation of labor relations, with the Federal Government and this Board surrending jurisdiction in wide areas. * * *"

The majority opinion countered:[3]

> "* * * If one of the inevitable consequences of our action is to leave a somewhat larger area for local regulation of disputes, we do not share our colleagues' apparent view that this is a sinister development. * * *"

The majority action was a considered relinquishment of a field for the exercise of the states' reserved powers.

Prior to the foregoing decision, while the matter of curtailment of National Labor Relations Board jurisdiction was under consideration, Chairman Guy Farmer said:

> "'Regardless of the legal scope of the commerce clause the federal agencies should, as a matter of self-

[1] 34 LRR 67, 68-69 (1954).
[2] 110 NLRB 501.
[3] 110 NLRB 497.

> restraint, impose limits on their own power and thus provide the opportunity for local problems to be settled on a local basis by the citizens of the communities in which these problems arise.' "[1]

The national board has appeared before the courts, either directly as a party[2] or as *amicus curiae*[3] to oppose the recognition of state jurisdiction where the board believed state action would interfere with the operation of the federal legislation. With respect to industries of which the board has declined jurisdiction, however, the board's position has been stated at page 11 of its memorandum filed in the *Laburnum* case:[4]

> "It [the Board] has, however, as a matter of practice repeatedly refrained from intervening in any way in situations where the States, despite the absence of any cession agreement, have taken action with respect to industries over which the Board as a matter of policy declines to take jurisdiction. See *Almeida Bus Service*, 99 N. L. R. B. 498, 500-501."

The expressions of the National Labor Relations Board, and its actions, from 1935 through 1954, have uniformly manifested its interpretation of the law as leaving to state and local control those industries of which it elects to decline jurisdiction.

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[1] **NLRB Press Release R-28**, October 21, 1953;

[2] **Capital Service v. National Labor Relations Board**, (1953, C. C. A. 9) 204 F. 2d 848;

[3] **La Crosse Telephone Corp. v. Wisconsin Employ. Rel. Bd.**, (1949) 336 U. S. 18, 69 S. Ct. 379, 93 L. ed. 463;

Wisconsin E. R. Board v. Plankinton Packing Co., (1950) 338 U. S. 953, 70 S. Ct. 491, 94 L. ed. 588;

[4] **United Workers v. Laburnum Corp.**, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025.

VI.

CONGRESS, THROUGH FISCAL ACTION AND OTHERWISE, HAS MANIFESTED ITS APPROVAL OF THE BOARD'S POLICY TO LEAVE CERTAIN TYPES OF INDUSTRIES TO LOCAL REGULATION

The determination of the National Labor Relations Board to take jurisdiction of a dispute under the federal act has always been based upon a factual finding that the matter affects commerce.[1]

Such findings were originally made "as the individual cases arise;[2] but the board adopted the administrative practice in 1950 of defining general categories of industries with respect to which it would accept or decline jurisdiction, thus announcing the limits to which the act would be applied. The board's policy of declining jurisdiction of certain industries, on the ground that their impact over commerce is slight, has been impliedly approved by Congress, not only through acquiescence in the decision of this court in

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[1]As to intrastate enterprises, at least, such a finding has apparently been deemed a prerequisite to assumption of jurisdiction from the early days of administration of federal law to the present. See, for examples, **Howell Chev. Co. v. Labor Board,** (1953) 346 U. S. 482, 74 S. Ct. 214, 215, 98 L. ed. 215; **NLRB v. Fainblatt,** (1939) 306 U. S. 601, 83 L. ed. 1014, 59 S. Ct. 668; **Consolidated Edison Co. v. National Labor Relations Bd.,** (1938) 305 U. S. 197, 83 L. ed. 126, 59 S. Ct. 206; **National Labor Relations Bd. v. Jones & Laughlin S. Corp.,** (1937) 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615;

[2]**National Labor Relations Bd. v. Jones & Laughlin S. Corp.,** (1937) 301 U. S. 1, 32, 81 L. ed. 893, 57 St. Ct. 615.

National Labor Relations Board v. Denver Bldg. & Const. Trades Council,[1] but through its fiscal action.[2]

Perhaps the chief of the "existing circumstances" which has formed the basis of the board's findings, in limiting its jurisdiction, is the lack of funds to enable it to handle all cases of predominantly local nature, without detriment to those having a greater impact upon commerce. The budgetary basis of such curtailment was early made known to Congress:[3] and so the fact that budgetary considerations have continued to be one of the bases for limiting application of the federal act shows that it was Congress' purpose to leave an unoccupied area.

The board's declination of jurisdiction, in practically all cases, has been in recognition of the predominantly local nature of the excluded industries. In view of the pronouncement of this court that one of the circumstances which might be considered in rejecting jurisdiction is "the bearing and effect of any protective action to the same end already taken under state authority,"[4] it may be presumed that the board had that factor in mind in narrowing its field of operation.

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[1] **N. L. R. B. v. Denver Bldg. & Trades Council,** (1951) 341 U. S. 675, 71 S. Ct. 943, 95 L. ed. 1284.

[2] It has been recognized that the intent of Congress as to interpretation of a law may be revealed through its action on appropriations. It was said in **Alaska S. S. Co. v. United States,** (1933) 290 U. S. 256, 262, 54 S. Ct. 159, 78 L. ed. 302, that:

> "• • • That [administrative] construction must be accepted and applied by the courts when, as in the present case, it has received congressional approval implicit in the annual appropriations over a period of thirty-five years, the expenditure of which was effected by resort to the administrative practice • • •."

[3] See, for example, the testimony of Chairman Herzog, in Senate Hearings on Senate Resolution 248, 81st Congress, 2d Session, 120;

[4] **Consolidated Edison Co. v. National Labor Relations Bd.,** (1938) 305 U. S. 197, 223, 83 L. ed. 126, 59 S. Ct. 206.

That presumption is fortified by the fact that the national board's progressive narrowing of its jurisdiction was accompanied by an increase in state regulation.[1]

In the light of the board's recognition that its declination of jurisdiction relinquishes an area for local regulation, Congress' continuance in the fiscal policy which resulted in narrowing the application of federal law must indicate its approbation of local regulation in predominantly local enterprises.

VII.

THE BOARD'S ANNOUNCEMENT OF GENERAL POLICIES AS TO NON-EXERCISE OF ITS JURISDICTION IS ANALOGOUS TO A CASE WHERE "EFFECTIVENESS OF FEDERAL SUPERVISION AWAITS FEDERAL ADMINISTRATIVE REGULATION." THIS COURT HAS HELD THAT STATES MAY ACT UNDER SUCH CIRCUMSTANCES

Since the National Labor Relations Board is an administrative agency, its action must be regarded either as an exercise of its rule-making power or of its fact-finding functions. The generality of the pronouncements here involved gives them some of the characteristics of an administrative rule.

This court has indicated that the following interpretative rules would be applied with respect to labor legislation:

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[1]Harry A. Millis & Harold A. Katz "A Decade of State Labor Legislation 1937-1947," 15 U. of Chicago Law Review 282-310.

[2]**Bethlehem Steel Co. v. New York State Labor Rel. Bd.**, (1947) 330 U. S. 767, 774, 67 St. Ct. 1026, 91 L. ed. 1234.

"* * * In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised. * * * However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, cf. *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, *Northwestern Bell Telephone Co. v. Nebraska State Commission, supra; Welch Co. v. New Hampshire, supra.* The states are in those cases permitted to use their police power in the interval. *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U. S. 1. * * *"[1]

The action of the National Labor Relations Board in announcing general standards on which it would accept or reject jurisdiction has identified a "separable or distinct segment" of the matter covered by the federal act which "will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation," so that "the police power of the state may be exercised."

Had the National Labor Relations Board exercised its discretion at the inception of administration under the fed-

[1]Id. loc. cit. 330 U. S. 773-774.

eral labor legislation, either by rule or by a series of findings, that it would not enter designated intrastate areas, there would probably have been little question that those areas would continue under state jurisdiction—since they involve a field traditionally subject to state control. Surely the fact that the boundary lines have been carved out as a result of experience rather than as a matter of first impression does not alter the substance of the action.

If Congress had itself defined the limits of regulation in the terms of the act, as the National Labor Relations Board has done administratively, it would probably not be questioned that intrastate enterprises outside those limits would remain subject to state control. Likewise, if Congress had first fixed the limit of its regulation at one line, and then withdrawn to another, it would doubtless be held that the reserved state power—which remained dormant, though superseded—would again occupy the vacated area.

Why should the situation be different, where Congress has delegated to an administrative agency the authority to define the extent of its regulation?

VIII.

CONGRESS DID NOT INTEND THE LAW TO BE INTERPRETED TO DEFEAT THE CONSTITUTIONAL PURPOSE OF INSURING TO ALL CITIZENS THE "EQUAL PROTECTION OF THE LAW," AS WOULD BE THE CASE IF STATES WERE DENIED THE RIGHT TO GIVE RELIEF TO A PART OF THEIR CITIZENS, WHO HAVE NO OTHER MEANS OF PROTECTION

It is recognized, at least in theory, that there are some labor relations within the states which Congress cannot reach under the Commerce Clause of the Constitution.[1] As to such enterprises, a state may undoubtedly apply its laws so as to furnish protection to its citizens.

An interpretation of the federal law which would leave states free to furnish a remedy to a citizen in one case, but would obligate it to deny the same remedy to another citizen—even though there is no other means by which the latter might obtain protection—would violate the spirit of Art. XIV of the Constitution which provides that:

> "* * * no state shall * * * deny to any person within its jurisdiction the equal protection of its laws."

To illustrate the result of holding states ousted from the area in which the National Labor Relations Board has relinquished jurisdiction, let us take two hypothetical cases.

An employee in a purely intrastate enterprise, which does not "affect" commerce, is wrongfully discharged because of labor union activities. Another employee, in an

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[1] **Alabama Federation of Labor v. McAdory, (1945) 325 U. S. 450, 65 S. Ct. 1384, 89 L. ed. 1725.**

enterprise which "affects" commerce but is outside the National Labor Relations Board jurisdictional standards, is also wrongfully discharged for the same reason.

The first employee can go to his state courts for a remedy. The second can secure no remedy under the federal law; but is it also to be held that his state is precluded from helping him?

Conceivably such a result might be reached without violating a specific provision of the Constitution; but surely such a result should not be predicated on the intent of Congress that one man should be entitled to a remedy from his state, and that another must be without *any* remedy for an identical wrong. There should not be imputed to Congress an intent contrary to the basic purpose of our government, to give equal justice to all.

A statutory interpretation which would create a no-man's land, an area without government, would not only be contrary to the principle of equal justice for all, but inconsistent with principles of federalism, as indicated in the following summation:

> " 'The constitutional arrangements of these two different nations [Germany and the United States]—originating so far apart in time, brought about under different circumstances but arriving at approximately the same end—indicate a constitutional necessity that there not be left a governmental vacuum from which the legislative power of the component states have been removed, but which the central government has chosen not to fill.' "[1]

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[1]Arthur E. Sutherland "Commerce, Transportation & Customs," in Studies in Federalism, Robert R. Bowe & Carl J. Friedrich, page 316.

IX.

CONSIDERATION OF THE CONSEQUENCES OF EXCLUDING STATES FROM REGULATING INDUSTRIES OUTSIDE THE JURISDICTIONAL STANDARDS OF THE NATIONAL LABOR RELATIONS BOARD INDICATE THAT CONGRESS DID NOT INTEND SUCH EXCLUSION

This court has invalidated state regulation on grounds of Congressional preemption only where there was actual or potential conflict.[1] Although invalidation of state action on grounds of *actual* conflict may be based solely on the facts of the specific case, a determination of *potential* conflict necessitates anticipation of consequences not necessarily present in the case at bar.

Neither the case of *Amalgamated Meat Cutters & Butcher Workmen v. Fairlawn Meats, Inc.*, #41, October Term, 1956, nor *Guss v. Utah Labor Relations Board*, #280, October Term, 1956, involves any *actual* conflict with federal law, either substantively or administratively. It is not suggested that anyone has been deprived of a federally guaranteed right, nor is there any possibility of conflicting administration by the National Labor Relations Board. Argument that Congress has ousted states in this field must rest upon consideration of results that might flow from one or the other interpretation.

It is not to be presumed that any state would act in such a manner, if permitted to regulate, as to deprive citi-

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[1] "The care we took in the **Garner** case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict existed, the state procedure would have survived." **United Workers v. Laburnum Corp.**, (1954) 347 U. S. 656, 665, 74 S. Ct. 833, 98 L. ed. 1025.

zens of federally guaranteed rights.[1] If there should be an overstepping, it could be tested in the same manner as in previous cases where state regulation has been challenged.[2]

Congress' intent to exclude states in the area in which the National Labor Relations Board could, but does not, regulates has not been manifested in the *terms* of the federal statute. Such an intent could be inferred only on the basis of anticipated conflict in administration.

The segment of intrastate enterprise, which it is asserted Congress has removed from the traditional field of state regulation, has been excluded by administrative fiat from the practical application of federal law. Assuming that authority for such action was duly delegated by Congress to the National Labor Relations Board,[3] the definition of the extent of the application of the law becomes as much a part of its substance as if written into it, or as if incorporated through judicial interpretation. The action of the board, which Congress has delegated to act for it, is in effect the action of Congress.

The boundary line may be altered in the future by reason of changing circumstances; but that is a characteristic of *any* legislation or regulation. Every citizen in every

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[1] **Amalgamated Clothing Workers v. Richman Brothers,** (1955) 348 U. S. 511, 99 L. ed. 600, 75 S. Ct. 452;

[2] The following is only a partial list of illustrations: **United Auto, A. & A. I. W. v. Wisconsin Emp. Rel. Bd.,** (1956) 351 U. S. 266, 76 S. Ct. 794; **United Workers v. Laburnum Corp.,** (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025; **Weber v. Anheuser-Busch, Inc.,** (1955) 348 U. S. 468, 75 S. Ct. 480, 99 L. ed. 546; **Garner v. Teamsters Union,** (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228; **International Union, etc. v. O'Brien,** (1950) 339 U. S. 454, 70 S. Ct. 781, 94 L. ed. 978; **Hill v. Florida,** (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782;

[3] The authority to establish general categories for application or non-application of the federal law has been implicitly approved in **N. L. R. B. v. Denver Bldg. & Trades Council,** (1951) 341 U. S. 675, 71 S. Ct. 943, 95 L. ed. 1284.

line of endeavor must face the possibility that the law of tomorrow may not be the same as the law of today.

The existing law, as determined by the specialized agency authorized by Congress to gauge current needs, is that certain categories of intrastate enterprise are excluded from administrative application of the Labor Management Relations Act.

The question is whether Congress has manifested an "unambiguous purpose" that these intrastate enterprises shall also be exempted from state regulation and so placed in a state of practical anarchy.

A mere enumeration of a few of the categories of enterprises which are excluded from regulation under the federal statute demonstrates their tremendous importance to the local welfare.

Local electric and water utilities:

Cascade Natural Gas Corporation, 110 NLRB 947;
So. Wyoming Utilities Co., 110 NLRB 1490.

Rural electrical cooperative associations:

Clay Electrical Coop. Inc., 111 NLRB 175.

Local transportation companies:

Breeding Transfer Co., 110 NLRB 493;
Charleston Transit Co., 111 NLRB 1214;
Safeway Transit Co., 111 NLRB 1359;
Suburban Transit, Inc., 111 NLRB 1251.

Many more could be added to this illustrative list; but examples need not be multiplied to demonstrate the point. A hypothetical case involving a rural electrical cooperative should suffice.

Let us suppose that such a cooperative association declines to bargain with a labor organization representing its employees—a real possibility, because there still remains some unwillingness in unindustrialized rural areas to deal with urban labor representatives. The employees could have no remedy under the federal law. If they are precluded from a remedy under state law they have no recourse but to resort to industrial strife, which it is the avowed purpose of Congress to prevent.

The stoppage of electrical service in rural areas might have slight impact on commerce between the states; but it would have a tremendous impact on local welfare and economy.

The stoppage of such electrical service would mean the shutting off of refrigeration for farms and farm processing plants—resulting not only in economic loss through spoilage, but in health hazards to the urban communities served. The lack of power for milking machines, hatcheries, and processing plants would mean not only economic loss for the producers, but shortages in food supplies in local areas.

Surely Congress did not intend that these areas, so important to local economy and welfare, should be excluded from local, as well as federal, protective regulation.

X.

CESSION UNDER SEC. 10 (a) IS NOT NECESSARY TO ENABLE STATES TO ACT, UNDER RESERVED POWERS, AS TO INDUSTRIES OF WHICH THE NATIONAL LABOR RELATIONS BOARD HAS INDICATED IT WOULD DECLINE JURISDICTION

There is nothing in the language or the legislative history of sec. 10 (a) of the Labor Management Relations Act to manifest an "unambiguous purpose"[1] to forbid state action except upon a specific cession of jurisdiction by the National Labor Relations Board.

The purpose of sec. 10 (a) was assessed by this court in 1949 as "merely to preclude conflict in the *administration* of remedies for the practices proscribed by sec. 8."[2] (Emphasis supplied)

Where there is *no* administration of remedies under federal law, there can be no conflict in administration.

If Congress had intended that there could be no exercise of state jurisdiction in the absence of a specific cession agreement, it could have included language to make that intent clear, after the decision in the *Algoma case, supra,* and in the other decisions recognizing validity of state action without a cession agreement.[3]

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[1] **Algoma Plywood & Veneer Co. v. Wisconsin Employ, R. Board,** (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691;

[2] **Algoma Plywood & Veneer Co., supra.**

[3] **United Auto., A. & A. I. W. v. Wisconsin Emp. Rel. Bd.,** (1956) 351 U. S. 266, 76 S. Ct. 794;

United Workers v. Laburnum Corp., (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025;

International Union v. Wisconsin E. R. Board, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651;

Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691.

Congress' failure to make any change, together with other aspects of the legislative history, show that it intended the cession agreement to be necessary only where the National Labor Relations Board has affirmatively asserted jurisdiction by making findings as to the "factual question" whether "conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control."[1] Congressional inaction indicates that it intended sec. 10 (a) to apply only to cases where the use of state facilities is sought primarily as an adjunct of the National Labor Relations Board rather than as independent autonomies under reserved powers.

The following is an excerpt from a well-reasoned analysis of the legislative intent behind sec. 10 (a):[2]

> "* * * At the time the amendments to the Act were being considered there were two ways by which the states took jurisdiction over labor relations affecting commerce. One was through the federal Board's practice of making agreements with state and territorial labor agencies. In those agreements the federal Board ceded jurisdiction to the local agencies not only over cases which it had declined to take but also over many which it normally processed. The most comprehensive agreement was probably the one signed with the Labor Relations Board of Puerto Rico. Under its terms, the federal Board closed its offices in the Island, leaving the insular Board to act as its agent in a very limited field, while ceding to it jurisdiction over all other enterprises which had previously come under national regulation.

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[1] **Consolidated Edison Co. v. National Labor Relations Bd.**, (1938) 305 U. S. 197, 83 L. ed. 126, 59 S. Ct. 206;

[2] Raul Serrano Geyls, "The National Labor Relations Board Jurisdictional Standards: A Problem in Federalism," Volumen XVI, Numero 1, Revista, Del Colegio De Abogados De Puerto Rico.

"The second method used by the states was simply to take over some of the types of cases which the federal Board had declined to consider or those areas in the field of labor relations which they believed were not covered by the federal Act. No agreement with the federal Board was necessary for such purposes. That was the situation which prevailed in nearly forty states where no labor boards were functioning and in some others where arrangements between the states and the federal Board had not been adopted.

"It is clear that Congress must have ben informed of the existence of these two methods. It is significant, therefore, that Section 10 (a) expressly covers outright cession while completely omitting mention of the other. The legislative intent was presumably, therefore, to establish the condition under which the Board could cede to the states authority over those cases which it would normally handle but the transfer of which to the states seemed advisable on policy or administrative consideration. If the intent would have been to regulate both cession and declination, it would have been very easy for Congress expressly to forbid state action unless authorized by Section 10 (a). No such language is to be found in the proviso. The situation calls then for the time-honored rule that 'In construing federal statutes enacted under the power conferred by the Commerce Clause of the Constitution, it should never be held that Congress intends to supersede or suspend the exercise of the reserve powers of the states, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.'

"If we turn to the admitted purpose of Section 10 (a)—the uniform application of national labor policy in interstate commerce—again we find no justification for prohibiting state intervention. It is evidence that

if a 'no-man's land' is created in the area abandoned by the federal Board, the congressional policies incorporated in the Taft-Hartley Act will not be put into effect. To find uniformity it would have to be presumed that lack of regulation has become the accepted national policy in that area. Nothing, however, would be more contrary to the congressional intent than a return to the pre-Wagner era in labor relations. Such interpretation would bring back trial by economic combat as the approved method for solving labor-management problems. It would mean that the rights of labor to organize, to bargain collectively and to participate in concerted activities, which Congress and the Board have sedulously defended since 1935, would be deprived of legal protection, while at the same time labor unions would be completely free to engage in the type of activities against employers and individual employees which the Taft-Hartley Act forbids. The essential consideration, however, behind the approval of the Wagner Act, and more particularly, of the Taft-Hartley Act, was a belief that broad government intervention was indispensable to a more equitable and civilized conduct of labor relations. As all states, either through their courts or legislatures, have endeavored to regulate certain aspects of this field, it would seem that such regulation, even if varied, would be more in accordance with the essential purpose of Congress than the 'law of the jungle' which would otherwise prevail."

XI.

CONGRESS INTENDED THAT STATES MIGHT CONTINUE TO EXERCISE RESERVED POWERS, WITH RESPECT TO INTRASTATE INDUSTRIES IN THE CATEGORIES IN WHICH NO FEDERAL REMEDY IS AVAILABLE, WITHOUT FURTHER ACTION OF THE NATIONAL LABOR RELATIONS BOARD AS TO THE SPECIFIC CONTROVERSY

A precisely defined segment of intrastate enterprise has been removed from the scope of federal administrative remedies. It is significant that the action of the National Labor Relations Board does not merely exclude these areas from certain phases of its administration, but that its pronouncement is to the effect that it will not "assert jurisdiction"[1] of industries in such categories.

All that remains to be done to determine whether a specific enterprise lies on one or the other side of the boundary line is a finding of fact based on strictly mathematical calculations. Certainly the objective of the National Labor Relations Board—to remove "purely local"[2] enterprises from its case load so that it can give "adequate attention to more important cases"[3]—can not be effectuated if it must perform a routine mathematical, fact-finding process in thousands of cases in order to establish that it will not assert jurisdiction. The very fact that the National Labor Relations Board prescribed its jurisdictional standards so as to be readily ascertainable, without exercise of discretion, indicates that it did not anticipate having to perform

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[1] Breeding Transfer, 110 NLRB 493, 494;
[2] Breeding Transfer, loc. cit. 110 NLRB 493;
[3] Breeding Transfer, 110 NLRB 493, 497.

any further time-consuming function in order to effectuate its policy.

To require that the National Labor Relations Board must make a specific declination of jurisdiction as to each labor dispute before it, would be to restore the "case-by-case" test rejected in the *Bethlehem Steel* case.[1] Irrespective of the merits of such a test, it would be anomalous to *discard* it in inferring a legislative intent to oust state jurisdiction; and then later—re-adopt it in order also to infer a Congressional intent to oust state jurisdiction—particularly when Congress must have known such a test had long since been rejected. This is particularly significant in the face of the oft-repeated precept that Congress' intent to exclude state action in an intrastate field "is not to be implied unless the legislation fairly interpreted is an actual conflict with the state law."[2]

The test for determination of inclusion and exclusion of industries from its jurisdiction has been deliberately devised by the National Labor Relations Board to enable the parties themselves to know their status without resort to judicial or administrative action. In any case where there might be a disregard of the jurisdictional standards, so as to defeat rights guaranteed by federal law, the usual judicial remedies are available.

Irrespective of where the dividing line is drawn, an enterprise seeking immunity from state or local regulation on grounds of interstate commerce must establish the factual basis on which it claims such immunity. There has never heretofore been any *presumption, without proof*, that

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[1]Bethlehem Steel Co. v. New York State Labor Rel. Bd., (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234.

[2]See Townsend v. Yeomans, (1937) 301 U. S. 441, 454, 57 S. Ct. 842, 81 L. ed. 1210.

an enterprise operating wholly within one state was engaged in commerce, or that its operations affected commerce.

Whether the operations of a particular enterprise affect commerce so closely as to remove it from state control is a matter for affirmative proof in each case. See, for instance, *D. A. Schulte, Inc. v. Gangi*, (1946) 328 U. S. 108, 120, 66 S. Ct. 925, 90 L. ed. 1114, where it was said:

> "The burden of proof that rests upon employees to establish that they are engaged in the production of goods for commerce must be met by evidence in the record. * * *"

In *Warren-Bradshaw Drilling Co. v. Hall*, (1942) 317 U. S. 88, 90, 87 L. ed. 83, 63 S. Ct. 125, it was said:

> "The application of the Act depends upon the character of the employees' activities. * * * The burden was therefore upon respondents to prove that, in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods, within the meaning of the Act, and that such production was for interstate commerce. * * *"

In *Maitrejean v. Metcalfe Construction Co.*, (C. C. A. Minn. 1948) 165 F. 2d 571, 574, it was said:

> "It may well be that a timekeeper, a substantial portion of whose time is given to keeping the time of employees engaged in interstate commerce, is entitled to the protection of the Act. * * *. Even so, the burden is upon the employee to show that a substantial portion of his time was devoted to work within the protection of the Act. * * *"

That the federal labor-relations laws are not to be applied, any more than others, without proof as to interstate commerce, is established by *C. I. O. v. McAdory.*[1]

An illustration of an application of the foregoing principle is *Wisconsin E. R. Board v. Gilson Brothers.*[2] In that case, an employer received an adverse decision under state law. After the decision, he tried to assert that the National Labor Relations Act had exempted him from state jurisdiction. He had, however, neglected to offer proof of the nature of his operations; and this court denied certiorari.

The area for state exclusion under the federal act has been determined on the basis of proof that the operations of the enterprise placed it within a category "over which the National Board has consistently exercised jurisdiction,"[3] rather than upon an actual assumption of jurisdiction over the specific industry.

This court has several times indicated that Congressional exclusion under the federal statute is related to the extent of *general* regulation under administrative practice, rather than upon action addressed to the specific case.[4]

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[1] (1945) 325 U. S. 472, 65 S. Ct. 1395, 89 L. ed. 1741;

[2] (1949) 255 Wis. 316, 38 N. W. 2d 483 cert. den. 338 U. S. 891, 70 S. Ct. 240, 94 L. ed. 547;

[3] **La Crosse Telephone Corp. v. Wisconsin Employ. Rel. Bd.,** (1949) 336 U. S. 18, 69 S. Ct. 379, 93 L. ed. 463.

[4] **La Crosse Tel. Corp. v. WERB,** 336 U. S. 25—"the industry is one over which the National Board has consistently exercised jurisdiction." **International Union v. WERB,** 336 U. S. 256—"the facts of the present case do not bring it within the protection of the Act as administered by the Board. We do not find any fixed Board policy to apply the Act to such facts as we have here." **Amalgamated Association v. WERB,** 340 U. S. 391, 392—"No distinction between public utilities and national manufacturing organizations has been drawn in the administration of the Federal Act." **Garner v. Teamsters Union,** 346 U. S. at 488—"Nor is there any suggestion that . . . the federal Board would decline to exercise its powers once its jurisdiction was invoked."

The time element is another practical consideration which indicates that Congress did not intend that the National Labor Relations Board must specifically decline jurisdiction of each labor dispute before such dispute may be deemed a proper subject for state action. One of the purposes of Congressional legislation was to prevent industrial strife. Such prevention requires expeditious, if not immediate, action. The annual reports of the National Labor Relations Board show that the period required for processing contested unfair practice charges averages very nearly a year.[1] If state action must be postponed until after investigation or hearing by an overworked federal agency, the evil to be prevented may well have wrought its harm. The situation might be described in the following words of Phillip Ray Rogers, Member of the National Labor Relations Board:[2]

> "In the first place, I believe that the time consumed in resolving these disputes would be prohibitive. In view of the emergency nature of these cases, time is of the essence, and in view of the involved nature of the Board's procedures, any decision which resulted could be more properly described as an epitaph than a solution."

Without conceding that chaos and confusion would result from a case-by-case test—as is sometimes predicted

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[1]The time for declination of the jurisdiction of the National Labor Relations Board where there is no contest, as in one of the cases at bar, can furnish little guidance. It is the vigorously contested cases which furnish the most fertile field for industrial conflict. In such cases, the records establish that disposition of a specific complaint may run into a period of years instead of months, even where final dismissal does not involve determination on the merits. See, for example, the case of the **Kohler Co.** where the trial examiner's dismissal on technical grounds was not issued for more than two years after the complaint was filed. 38 L. R. R. 503.

[2]Address to Assn. of General Contractors of America, Mar., 1955, 35 L. R. R. 467.

by parties who seek to avoid adverse application of either federal or state law—it may still be confidently asserted that the boundary line between respective federal and state jurisdiction under the yardstick adopted by the National Labor Relations Board offers a realistic opportunity for certainty and stability—providing those on either side of the line have some law to which they can resort.

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